

15 BEAs include 18 Cellular Market Areas (“CMAs”).¹³⁶ In eight of these CMAs the spectrum screen is exceeded by four MHz or less, and in 14 CMAs the overage is nine MHz or less.

The Commission has found “[t]he presence and capacity of rival service providers, taking into account near-term opportunities to obtain access to additional spectrum, are such ... that the response of these rival service providers would likely be sufficient to deter any unilateral actions or anticompetitive behavior.”¹³⁷ As *Exhibit 5* hereto shows, in each of the counties where the spectrum screen is triggered, multiple licensees hold “in-screen” spectrum. Indeed, in each of the counties there are at least six holders of in-screen spectrum in addition to Verizon Wireless, and in half of these counties there are eight or more. These licensees are either competing today, could enter the market and compete, or could assign their spectrum to others seeking to compete, and no commenter shows why they could not do so.¹³⁸ Moreover, as discussed further below, there are additional spectrum bands that, while not yet included in the spectrum screen, nonetheless support or could support multiple providers in the mobile telephony/broadband market.¹³⁹

Further, Commission standards developed in its review of wireless mergers involving the transfer of operations and customers – a more intensive review than this one – provide support for a finding of no harm to competition in the few markets here where the spectrum screen is

¹³⁶ There are more CMAs than BEAs because four of the BEAs include all or parts of more than one CMA.

¹³⁷ *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17490-17491 ¶ 98; *see also AT&T Inc. and Centennial Communications Corp.*, Memorandum Opinion and Order, 24 FCC Rcd 13915, 13948-49 ¶ 76 (2009) (“*AT&T-Centennial Order*”).

¹³⁸ *See generally* Free Press at 9, 24; NTCH at 1-2, 4; Public Knowledge at 22; RCA at 9-10, 26-30; RTG at 11, 14; Rural Broadband Policy Group at 2. Both SpectrumCo and Cox Wireless have made clear that they decided not to enter the market for reasons independent of these transactions. *See supra* Section I.E.

¹³⁹ *See infra* Section II.D.

triggered. The Commission considers the presence of at least four post-transaction competing providers as a significant factor in finding no likelihood of competitive harm.¹⁴⁰ Here, in all but one of the relevant CMAs,¹⁴¹ there will be four post-transaction competitors: three other nationwide facilities-based providers (*i.e.*, AT&T, Sprint, and T-Mobile) in addition to Verizon Wireless that are currently offering wireless service in every screen-triggered county. And in most of these CMAs, additional providers beyond the four national carriers also are operational.

C. Commenters Fail to Demonstrate Any Competitive Harm at a National Level.

Perhaps recognizing that the transactions require no further competitive analysis in all but a handful of geographic areas – and even in those geographic areas, there is no evidence of competitive harm – commenters attack the transaction under a variety of novel theories. None of these theories, however, has ever been adopted by the Commission as a basis to deny or condition a license assignment – nor is there any basis to adopt them now.

Some commenters, including T-Mobile, claim that the transactions will somehow harm competition at the national level, without substantiating how a mere transfer of spectrum would cause such a result.¹⁴² Their claims can be quickly rejected, and T-Mobile’s advocacy is in direct conflict to its own CEO’s congressional testimony last year: “The U.S. wireless marketplace is

¹⁴⁰ See *AT&T-Centennial Order*, 24 FCC Rcd at 13948 ¶ 76 (citing the presence of four or more competitors post-transaction as a basis for finding “no competitive concerns requiring remedy”); *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17490-91 ¶ 98 (finding that the presence of four or more operational competitors post-transaction justified a determination that competitive harm is unlikely).

¹⁴¹ In this CMA (Minnesota 5 – Wilkin CMA (CMA486)), there will remain both before and after the transactions four competitors in one of the screen-triggered counties (Swift County) and two competitors in the other two screen-triggered counties (Big Stone and Traverse Counties).

¹⁴² See Free Press at 18-19, 37; RCA at 10-12, 41-42, 44-46.

very competitive. Approximately three-quarters of Americans today live in areas contested by at least five facilities-based wireless providers.”¹⁴³

First, as T-Mobile acknowledges, the national mobile wireless marketplace is highly competitive, driven not only by vibrant rivalry among carriers, but also by the combinations of devices, operating systems, applications, and content that comprise today’s consumer offerings.¹⁴⁴ In today’s wireless marketplace, mobile carriers simultaneously cooperate and compete with providers of services that both complement and substitute for their own products. This mobile ecosystem has led to the precise outcomes expected from a robustly competitive market: constant innovation, falling prices, substantial investment, and entry by new providers in various sectors. For example:

- *Prices keep dropping.* The trend towards lower prices and greater value has intensified, with voice revenue per customer declining 30 percent from \$47 to \$33 per month between 2005 and 2010, price per message declining 84 percent from 5.7 cents to 0.9 cents over that same period, and price per megabyte of data service declining nearly 90 percent from 47 cents to 5 cents between 2008 and 2010.¹⁴⁵
- *Investment is growing.* Despite adverse national economic conditions, competitive rivalry is driving billions of dollars into 3G and 4G network deployments. Mobile wireless providers invested almost \$25 billion in 2010, a 22 percent increase over

¹⁴³ *The AT&T/T-Mobile Merger: Is Humpty Dumpty Being Put Back Together Again? Before the S. Comm. On the Judiciary, Subcomm. Antitrust, Competition Policy and Consumer Rights*, 112th Cong. (2011) (statement of Phillip Humm, CEO, T-Mobile USA) at 3, <http://www.judiciary.senate.gov/pdf/11-5-11%20Humm%20Testimony.pdf>.

¹⁴⁴ See generally JONATHAN SALLET, THE INTERNET ECOSYSTEM AND LEGAL REGIMES: ECONOMIC REGULATION SUPPORTING INNOVATION DYNAMISM (Nov. 11, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1957715; JONATHAN SALLET, THE CREATION OF VALUE: THE BROADBAND VALUE CIRCLE AND EVOLVING MARKET STRUCTURES (Apr. 4, 2011), <http://www.annenberglab.com/viewresearch/27>; JEFFREY EISENACH, THEORIES OF BROADBAND COMPETITION (Jun. 20, 2011) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1868381; Comments of Verizon Wireless, WT Docket No. 11-186 (filed Dec. 5, 2011) (“Verizon Wireless 2011 Competition Comments”).

¹⁴⁵ Roger Entner, *What is the price of a megabyte of wireless data?*, FIERCEWIRELESS, Apr. 13, 2011, <http://www.fiercewireless.com/story/entner-what-price-megabyte-wireless-data/2011-04-13> (citing Recon Analytics and Nielsen data).

2009.¹⁴⁶ Since 2001, America's wireless carriers have made an average combined investment of more than \$22.8 billion per year.¹⁴⁷ This trend shows no sign of slowing, as carriers invested \$12.7 billion during the first half of 2011 alone.¹⁴⁸

- *Numerous and diverse providers compete.* The U.S. mobile wireless marketplace includes 181 facilities-based mobile providers,¹⁴⁹ including national providers, regional carriers, and numerous smaller entities that are deploying 3G and 4G services. In addition, there are approximately 40 to 60 resellers/ MVNOs.¹⁵⁰
- *Customer satisfaction is high.* The FCC in 2010 found that 92 percent of surveyed cell phone users are very satisfied or somewhat satisfied with their cell phone service.¹⁵¹ Consumer Reports' January 2012 edition observed that six out of seven conventional contract providers scored between 67 ("fairly well satisfied") and 87 ("very satisfied") – an improvement over the previous year.¹⁵² American Customer Satisfaction Index recently found that wireless consumer satisfaction remains strong and has increased substantially since 2004.¹⁵³

Second, the transactions will do nothing to harm this competition at the national level.

Customers will have the same competitive choices post-transaction as they do today, and will enjoy the same positive trends detailed above. Moreover, this robust national competition also restrains unilateral or coordinated anticompetitive effects in local areas. Today, for example, most pricing and advertising strategies are set at the national level, thereby minimizing the

¹⁴⁶ ROBERT F. ROCHE & LIZ DALE, CTIA, CTIA'S WIRELESS INDUSTRY INDICES 137, 139 (May 2011).

¹⁴⁷ See *id.* at 143.

¹⁴⁸ See ROBERT F. ROCHE & LIZ DALE, CTIA, CTIA'S WIRELESS INDUSTRY INDICES: MID-YEAR 2011 RESULTS 144 (Nov. 2011).

¹⁴⁹ See, e.g., INDUSTRY ANALYSIS AND TECHNOLOGY DIVISION, FCC, LOCAL TELEPHONE COMPETITION: STATUS AS OF DECEMBER 31, 2010, at 28 tbl.17 (Oct. 2011), http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db1007/DOC-310264A1.pdf.

¹⁵⁰ See *Fifteenth Report*, 26 FCC Rcd at 9699 ¶ 34.

¹⁵¹ See JOHN HARRIGAN & ELLEN SATTERWHITE, AMERICANS' PERSPECTIVES ON ONLINE COLLECTION SPEEDS FOR HOME AND MOBILE DEVICES 4, Exh. 2 (June 1, 2010), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-298516A1.pdf.

¹⁵² See *Best Phones & Service*, CONSUMER REPORTS, Jan. 2012, at 36.

¹⁵³ American Customer Satisfaction Index, Scores By Industry, Wireless Telephone Service, http://theacsi.org/index.php?option=com_content&view=article&id=147&catid=&Itemid=212&i=Wireless+Telephone+Service (last visited Feb. 29, 2012).

impact of local conditions on the wireless industry as a whole. As a result, these strong national forces also limit the potential for either unilateral action or coordinated interactions by carriers at the local level, further undercutting any claimed harms from these transactions.

Third, contrary to the assertions of some commenters,¹⁵⁴ Verizon Wireless' spectrum holdings post-transaction pose no concern under any "national" metric. Verizon Wireless' average spectrum holdings on a nationwide basis would be 109 MHz if the proposed transactions are approved.¹⁵⁵ This amount is well below the amount of spectrum that Sprint Nextel and its partner Clearwire hold. Sprint has an average spectrum depth of 50 MHz and Clearwire "is the largest holder of licensed wireless spectrum in the United States," with an average of 160 MHz in major markets.¹⁵⁶ Moreover, 109 MHz is also well below one-third of the 422 MHz of spectrum currently included in the spectrum screen.¹⁵⁷

If providers' nationwide spectrum holdings are examined on a nationwide MHz*POPs basis,¹⁵⁸ Verizon Wireless would hold approximately 26 percent of the spectrum included in that

¹⁵⁴ See Free Press at 18-19, 37; RCA at 10-12, 41-42, 44-46.

¹⁵⁵ See *supra* Section I.D.

¹⁵⁶ See Clearwire Corporation, Form 10-K (2011 Annual Report) at 14 (Feb. 16, 2012) ("Clearwire Annual Report") (stating that Clearwire "hold[s] approximately 140 MHz of spectrum on average across [its] national spectrum footprint and approximately 160 MHz of spectrum on average in the 100 largest markets in the United States," which makes it "the largest holder of licensed wireless spectrum in the United States"), <http://corporate.clearwire.com/secfiling.cfm?filingID=1445305-12-337&CIK=1442505>; see also Clearwire, Our Network: Clearwire Has More Spectrum Than Anyone, <http://www.clearwire.com/company/our-network> (last visited Feb. 7, 2012) ("[W]ith the merger of Clearwire and Sprint's 4G business in 2008, we increased our spectrum holdings far beyond any other provider in the country.").

¹⁵⁷ The 422 MHz consists of 80 MHz of 700 MHz, 50 MHz of cellular, 26.5 MHz of SMR, 90 MHz of AWS, 120 MHz of PCS, and 55.5 MHz of BRS spectrum.

¹⁵⁸ See, e.g., *AT&T-Qualcomm Order* at ¶ 45.

screen post-transaction.¹⁵⁹ Under this metric, approval of these transactions would still leave available for competitors roughly three quarters of the spectrum under the existing spectrum screen – an amount that the Commission recognized in the *AT&T-Qualcomm Order* as presenting no competitive concerns.¹⁶⁰ Of course, this metric presumes only spectrum currently included in the spectrum screen is counted. If other available bands are included, Verizon Wireless’ share of spectrum holdings would be even less.

A few commenters suggest that smaller carriers have a greater need for spectrum than larger carriers like Verizon Wireless, and therefore it would be inappropriate to grant these license assignments.¹⁶¹ As explained below, this claim is barred by Section 310(d) of the Act, which requires the Commission to focus on the transaction before it and not on other hypothetical transactions.¹⁶² Moreover, it is utterly unsupported by any data, and in any event ignores the substantial differences among operators that affect spectrum need, including the number of consumers served and the amount of data carried. Under this theory, a two-lane road should be given preference to add additional lanes before a multi-lane highway does, regardless of the significant difference in traffic volume and demand. Verizon Wireless has demonstrated that it needs more spectrum to address projections of mobile data growth, and that it uses

¹⁵⁹ AT&T would hold approximately 21 percent of the relevant spectrum post transaction; Sprint Nextel and Clearwire would hold approximately 25 percent (individually, Sprint Nextel would hold 12 percent and Clearwire would hold 13 percent, ignoring Clearwire’s 4G operations on EBS spectrum); and T-Mobile would hold approximately 13 percent.

¹⁶⁰ See *AT&T-Qualcomm Order* at ¶¶ 44-45 (“Under this [MHz*POPs] measure, implementation of this transaction would still leave available for competitors at the national level more than three quarter of the spectrum suitable for mobile voice or broadband service.”).

¹⁶¹ See, e.g., T-Mobile at 4-5, 13-15; NTCH at 2-3, 5; see also Free Press at 27. T-Mobile’s claim is particularly ironic since it is currently before the Commission seeking approval to acquire its own block of AWS spectrum. Moreover, T-Mobile sat out entirely the last major spectrum auction, declining even to file an application to bid for what it terms the “most valuable” below 1 GHz spectrum.

¹⁶² See *infra* Section II.E; see generally Katz Declaration at ¶¶ 14-22.

existing spectrum efficiently – showings that none of the commenters have rebutted, much less made for their own operations.¹⁶³

D. The Commission Should Reject Proposals to Develop New Spectrum Limits or Tests.

Recognizing that the Commission’s analytical tools for assessing spectrum aggregation dictate approval of these transactions, some commenters make what amount to collateral attacks on the Commission’s spectrum and competition review policies. They assert that the Commission should change its analytical tools and create new spectrum limits or tests in the context of these transactions. They ask for a new overall cap,¹⁶⁴ adjustments to the spectrum screen,¹⁶⁵ or examination of spectrum holdings consisting of “4G LTE-ready” spectrum.¹⁶⁶ As the FCC has determined, *ex ante* spectrum aggregation caps are ill-conceived as a matter of policy,¹⁶⁷ and there is no basis to adopt a new cap, revise the screen, or apply new spectrum tests in the context of these license assignments.

The sheer variety and complexity of the many proposals for new spectrum aggregation rules or screens underscores why the Commission should not take them up in this proceeding. Commenters disagree among themselves on what the new policies should be, for example offering multiple conflicting ways to “weight” or “value” spectrum for purposes of a new cap or

¹⁶³ See, e.g., ITIF at 2, 4.

¹⁶⁴ See RTG at 7, 18-19.

¹⁶⁵ See Free Press at 9-19; Public Knowledge at 47; RCA at 47-53; Sprint Nextel at 18-20; T-Mobile at 20-34.

¹⁶⁶ See RCA at 14-15, 23, 49; *see also* NTCH at 4.

¹⁶⁷ See 2000 Biennial Regulatory Review; *Spectrum Aggregation Limits for Commercial Mobile Radio Services*, Report and Order, 16 FCC Rcd 22668, 22670-71 ¶¶ 4-6 (2001) (“*Spectrum Cap Repeal Order*”) (eliminating “inflexible spectrum aggregation limits” in favor of case-by-case review, and recognizing that “a bright-line approach can be inflexible, potentially permitting problematic transactions and precluding transactions that would serve the public interest”).

screen. Taking up these proposals here would sidetrack the Commission's review. It also would inject issues that have nothing to do with the specific license transfers here, because, as explained above, no party has demonstrated any specific competitive or consumer harm or rebutted the demonstrated consumer benefits of these transactions. And that – not how some screen or cap is calculated – is the key fact that warrants denial of the objections to these license assignments.

The Commission historically has used the spectrum screen solely as an analytical tool to determine the level of spectrum holding below which no further review is necessary. Since 2004, the Commission has consistently used one-third of the total spectrum available for mobile use as the threshold,¹⁶⁸ providing all concerned with some measure of certainty as they consider transactions and formulate business plans. Use of a consistent one-third threshold also has meant that the amount of spectrum included in the screen in past transactions has increased to reflect the fact that over time, the Commission has made available more spectrum for mobile services. But, while the use of a one-third threshold has allowed the level of the screen to essentially self-correct for the availability of additional spectrum, the Commission has never strayed from its policy that the screen is simply a trigger for competitive review when more than one third of available spectrum would be held by one entity. Commenters ask the Commission to now depart dramatically from this long-established policy and radically revise its policy in various ways, such as by valuing different bands differently (and thereby altering the fundamental premise that all useable spectrum should be included) or by imposing an actual cap on spectrum holding.

¹⁶⁸ See *Fifteenth Report*, 26 FCC Rcd at 9827 ¶ 281 (citing *AT&T Wireless-Cingular Order*, 19 FCC Rcd at 21568-69 ¶ 109).

Those radical and sweeping changes to the Commission’s long-established policy are meritless,¹⁶⁹ and in any event should not be taken up in this transaction review.

Reinstatement of a Spectrum Cap Is Unwarranted. Fundamentally, prophylactic limits on spectrum holdings are bad policy, which is why the Commission repealed its spectrum “cap” years ago.¹⁷⁰ *Ex ante* aggregation limits can harm competition and consumers because they make it more difficult and costly (and, in some cases, impossible) for a service provider to expand when it has consumer demand for services that requires additional spectrum.¹⁷¹ As a result, consumers are harmed by a combination of higher prices, lower service quality, and diminished innovation in service offerings.¹⁷²

Moreover, there is no justification to impose a cap in the context of these transactions. The only commenter seeking a cap – RTG¹⁷³ – offers no specific facts or evidence that Verizon

¹⁶⁹ See Katz Declaration at 56-57.

¹⁷⁰ See *Spectrum Cap Repeal Order*, 16 FCC Rcd at 22670-71 ¶¶ 4-6, 22693-95 ¶¶ 47-53.

¹⁷¹ See generally MICHAEL L. KATZ, AN ECONOMIC ANALYSIS OF THE SPECTRUM COMPONENT OF THE FEDERAL COMMUNICATIONS COMMISSION’S MERGER REVIEW SCREEN 4 (Aug. 19, 2008) (“KATZ SPECTRUM SCREEN ANALYSIS”), appended as Att. 3 to Joint Opposition to Petitions to Deny and Comments of Verizon Wireless and Atlantis Holdings LLC, WT Docket No. 08-95 (filed Aug. 19, 2008) (“Verizon Wireless-ALLTEL Joint Opposition”).

¹⁷² *Id.*

¹⁷³ See RTG at 7, 18-19. As a threshold matter, the Commission must dismiss the petition filed by RTG for failure to plead and establish standing. Petitions to deny must “contain *specific* allegations of fact sufficient to show that the petitioner is a party in interest” and “[s]uch allegations of fact shall . . . be supported by affidavit of a person or persons with personal knowledge thereof.” 47 U.S.C. § 309(d)(1) (emphasis added); see also 47 C.F.R. § 1.939(d). To establish standing, RTG must not only show that grant of the transactions will cause its members “to suffer a direct injury” but also must demonstrate “that it is likely, as opposed to merely speculative, that the alleged injury would be prevented or redressed if the assignment applications are denied.” See *NextWave-Cingular Order*, 19 FCC Rcd at 2579-80 ¶ 21. RTG has failed to carry this burden. It does not identify any of its members, state that its members operate or hold CMRS licenses in the subject markets, or otherwise allege specific facts showing that its members directly compete with the Applicants in relevant markets. RTG at 1 n.1; see *NextWave-Cingular Order*, 19 FCC Rcd at 2579-80 ¶ 21 (petitioners must make “specific allegations of fact”). The Commission must dismiss RTG’s petition for failing to specifically

Wireless' spectrum holdings post-transaction will result in competitive harm in any particular market or geographic area subject to these transactions. The Bureau has recently rejected these efforts in another transaction,¹⁷⁴ and an open proceeding addresses RTG's concern.¹⁷⁵ In addition, the limit RTG proposes – 110 MHz of spectrum below 2.3 GHz – ignores the fact that more spectrum resources are coming into use every day via a variety of mechanisms. These additional resources, including the PCS G Block, BRS/EBS, MSS and WCS, and unlicensed alternatives like Wi-Fi,¹⁷⁶ make such a limit both unnecessary and irrational.

There Is No Basis to Revisit the Spectrum Screen Here. The Commission recently held, “[B]ecause under any version of the overall spectrum screen relatively few, or no, local markets are triggered for further competitive analysis, ... there is no need to formally address what spectrum should be included in the Commission’s spectrum screen at this time.”¹⁷⁷ The same finding applies here. Given the very limited areas where the post-transaction holdings would

plead and establish standing as to how grant of the instant transactions will result in a direct injury to RTG. *See AT&T Wireless PCS, Inc.*, Order, 15 FCC Rcd 4587, 4588 ¶ 3 (WTB/CWD 2000) (citing *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972)).

¹⁷⁴ *See New Cingular-D&E Investments Order* at ¶¶ 6-7 (rejecting RTG’s request to consent to the assignment of spectrum to AT&T “only in markets where, post-transaction, AT&T would control less than 110 megahertz of total spectrum below 2.3 GHz,” citing the absence of specific facts or evidence to support such a finding in any of the markets at issue).

¹⁷⁵ *See Wireless Telecommunications Bureau Seeks Comment on Petition for Rulemaking of Rural Telecommunications Group, Inc. to Impose a Spectrum Aggregation Limit on All Commercial Terrestrial Wireless Spectrum Below 2.3 GHz*, Public Notice, 23 FCC Rcd 14875 (2008).

¹⁷⁶ *See, e.g.,* Steve Donohue, *Cablevision develops technology for WiFi-based mobile phone service*, FIERCECABLE, Feb. 3, 2012, <http://www.fiercecable.com/story/cablevision-develops-technology-wifi-based-mobile-phone-service/2012-02-03>.

¹⁷⁷ *AT&T-Qualcomm Order* at ¶ 41.

exceed the screen, requests that the Commission revisit the spectrum bands included in the screen in these transactions¹⁷⁸ are unwarranted.

In any event, even if certain spectrum bands were excluded from the screen,¹⁷⁹ any reduction in available spectrum would be more than offset by the following bands which, while not yet included in the spectrum screen, can support multiple potential new entrants in the mobile telephony/broadband market:

- 10 MHz PCS G Block, which is not included in the screen even though Sprint Nextel has announced plans to deploy LTE on this spectrum beginning later this year;¹⁸⁰
- At least 104.5 MHz of BRS/EBS spectrum, in addition to the 55.5 MHz of BRS currently included in the screen, as Clearwire recently stated it has 160 MHz in the top 100 markets;¹⁸¹
- 50 MHz of MSS ATC spectrum, which is not included in the screen even though the Commission recently stated that this spectrum “could potentially enhance competition in the provision of mobile terrestrial wireless services;”¹⁸² and

¹⁷⁸ See T-Mobile at 20-30; RCA at 51-52.

¹⁷⁹ See T-Mobile at 23-24 (seeking to exclude 12.5 MHz of SMR spectrum and 10 MHz of 700 MHz D Block spectrum).

¹⁸⁰ See Press Release, Sprint, Sprint Accelerates Deployment of Network Vision and Announces National Rollout of 4G LTE (Oct. 7, 2011), http://newsroom.sprint.com/article_display.cfm?article_id=2064. Indeed, T-Mobile does not oppose inclusion of the G Block, agreeing that this spectrum “is now licensed and available for broadband use.” T-Mobile at 22-23.

¹⁸¹ See Clearwire Annual Report at 14.

¹⁸² *Fifteenth Report*, 26 FCC Rcd at 9702 ¶ 39; see also *Fixed and Mobile Services in the Mobile Satellite Service Bands*, Notice of Proposed Rulemaking and Notice of Inquiry, 25 FCC Rcd 9481, 9490-91 ¶ 21 (2010). The National Broadband Plan identified 90 MHz of MSS spectrum as usable for terrestrial broadband: 40 MHz in the S-Band, 40 MHz in the L-Band, and 10 MHz in the Big LEO Band. See National Broadband Plan at 87, Exh. 5-G. Even taking into account the International Bureau’s proposal to suspend LightSquared’s ATC authority in the L-Band due to GPS interference concerns, see *International Bureau Invites Comment on NTIA Letter Regarding LightSquared Conditional Waiver*, Public Notice, DA 12-214, at 4 (Feb. 15, 2012), spectrum in the S-Band and Big LEO Band remains suitable for mobile broadband use. For example, DISH Network has filed applications to acquire control of the MSS licenses of DBSD Satellite Services and TerreStar Networks, which hold ATC authority covering a combined 40 MHz of S-Band MSS spectrum. See *DISH Network Corporation Files to Acquire Control of*

- 25 MHz of WCS spectrum, which is not included in the screen even though the Commission recently changed its technical rules to “immediately” make this spectrum available for mobile broadband services.¹⁸³

If, consistent with precedent, the Commission were to assess what other spectrum is “suitable” for the screen, all of this spectrum must be included in the screen.¹⁸⁴ T-Mobile’s objection to considering additional BRS/EBS spectrum and MSS/ATC spectrum as part of the Commission’s competition analysis rings hollow in light of its advocacy last year that all 194 MHz of BRS/EBS spectrum and 90 MHz of MSS/ATC spectrum should be included in the screen.¹⁸⁵ Indeed, as one T-Mobile executive explained in response to a national competitor challenging its transaction, “the fact that a major wireless competitor is making these arguments should give regulators pause.”¹⁸⁶

Licenses and Authorizations Held By New DBSD Satellite Services G.P. and TerreStar License Inc., Public Notice, 26 FCC Rcd 13018 (2011). DISH plans to launch a hybrid satellite and terrestrial mobile and fixed broadband network pending FCC action on the applications. See Mike Farrell, *Ergen: Dish Has 80% Chance of Wireless Success*, MULTICHANNEL NEWS, Feb. 23, 2012, <http://www.multichannel.com/article/480899-Ergen-Dish-Has-80-Chance-of-Wireless-Success.php>.

¹⁸³ See FCC News Release, *FCC Unleashes 25 MHz of Spectrum for Mobile Broadband Use* (May 20, 2010), at 1, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-298308A1.pdf; see also *Amendment of Part 27 of the Commission’s Rules to Govern the Operation of Wireless Services in the 2.3 GHz Band*, Report and Order and Second Report and Order, 25 FCC Rcd 11710, 11711 ¶ 1 (2010) (“2010 WCS Order”).

¹⁸⁴ The Commission considers spectrum to be a relevant input for inclusion in the spectrum screen if it is fairly certain to be “suitable” to be used in the near term to provide mobile telephony and mobile broadband services. See *AT&T-Qualcomm Order* at ¶¶ 38-39 & n.117.

¹⁸⁵ Compare T-Mobile at 24-28 with Joint Opposition of AT&T Inc., Deutsche Telekom AG, and T-Mobile USA, Inc. to Petitions to Deny and Reply to Comments, WT Docket No. 11-65, at 186 (filed June 10, 2011) (“In particular, the Commission should now include the 90 MHz of MSS/ATC spectrum and all 194 MHz of BRS/EBS spectrum, not just the 55.5 MHz it has considered before, because that spectrum is now available – or will soon be available – for the deployment of commercial mobile wireless services.”).

¹⁸⁶ Tom Sugrue, *Life (and Merger Review) Imitates Baseball*, T-MOBILE ISSUES & INSIGHTS BLOG (Aug. 8, 2011), <http://blog.t-mobile.com/2011/08/08/life-and-merger-review-imitates-baseball>.

Efforts to modify the spectrum screen trigger downwards are equally divorced from reality.¹⁸⁷ No credible analysis is provided as to how the current trigger of one-third of available spectrum is inadequate, or why any change is necessary to maintain robust competition.¹⁸⁸ The focus of the trigger should be on the total amount of spectrum available *to other competitors*, not how much an individual carrier holds in any given market. It is well established that providers may have significantly different spectrum needs while competing successfully, as the Commission has found that “many carriers are competing successfully with far lower amounts of bandwidth today.”¹⁸⁹

Suggestions that the Commission radically contort the screen to achieve commenters’ desired outcomes also should be rejected. These unwarranted and complex schemes to develop a weighted value of spectrum – whether based on spectrum characteristics, auction prices, book value, or other metrics purportedly designed to capture the value of different spectrum bands¹⁹⁰ – are far outside the proper bounds of this proceeding. Again, allegations of speculative harm in the absence of specific facts are woefully insufficient to justify a radical overhaul of the screen.¹⁹¹

¹⁸⁷ RCA at 52-53. The further suggestion that the trigger should only be altered for some carriers lacks any intellectual rigor as to why the Commission’s screen should treat two providers differently than all other potential licensees. *Id.*

¹⁸⁸ Katz Declaration at ¶¶ 61-62.

¹⁸⁹ *AT&T Wireless-Cingular Order*, 19 FCC Rcd at 21568-69 ¶ 109.

¹⁹⁰ See T-Mobile at 30-34; Free Press at 9-19; Public Knowledge at 47; RCA at 47-49; Sprint Nextel at 18-20.

¹⁹¹ See *AT&T Mobility-BTA Ventures Order* at ¶¶ 6-7; *New Cingular-D&E Investments Order* at ¶¶ 6-7; cf. *AT&T-Qualcomm Order* at ¶ 41.

In any event, any approach that attempts to weigh spectrum based on technical “value” is fundamentally unworkable.¹⁹² Different bands have different characteristics that can make them more or less attractive to a given carrier at a given time depending on many factors. For example, as the Commission has stated, “higher-frequency spectrum may be just as effective, or more effective, for providing significant capacity, or increasing capacity, within smaller geographic areas.”¹⁹³ Indeed, carriers that rely heavily or exclusively on spectrum over 1 GHz have emphasized the capacity benefits of higher band spectrum.¹⁹⁴ These capacity benefits are also attributable to the larger blocks of contiguous spectrum available in the higher bands,¹⁹⁵ and some radio systems “may perform better at higher frequencies.”¹⁹⁶ Dr. Katz explains that

¹⁹² Katz Declaration at ¶¶ 64-77.

¹⁹³ *Fifteenth Report*, 26 FCC Rcd at 9836 ¶ 296; *see also id.* at 9837 ¶ 296 (“[H]igher frequency spectrum can be ideally suited for providing high capacity where it is needed....”).

¹⁹⁴ In 2010, T-Mobile stated that “[t]here are certain circumstances where upper band spectrum is as effective as, *or preferred to*, lower band spectrum in providing competitive services, *particularly for enhancing capacity* in highly populated areas.” *Ex Parte* Notice from Russell H. Fox, Counsel for T-Mobile USA, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 10-133 *et al.*, at 2 (filed Dec. 2, 2010) (emphasis added). When touting its spectrum position to investors, Barry West, Sprint Nextel’s former Chief Technology Officer explained that “the 2.5 gigahertz band spectrum Sprint Nextel’s WiMAX network will use *compares favorably to 700 megahertz band spectrum*. While the lower band enables coverage to be deployed more cheaply initially, *the upper band allows greater overall capacity to handle more subscribers*.” *See* Paul Kirby, *Sprint Nextel CTO Offers Vigorous Defense of WiMAX*, TR DAILY, Apr. 22, 2008 (emphasis added).

¹⁹⁵ *See Fifteenth Report*, 26 FCC Rcd at 9836-37 ¶ 296; *see also* Clearwire Annual Report at 14 (“Our deep spectrum position [160 MHz] in most of our markets enables us to offer our subscribers significant mobile data bandwidth, with potentially higher capacity than is currently available from other carriers.”); John Saw, Clearwire, FCC National Broadband Plan Workshop, Spectrum, Tr. 35:19-21, 36:15-17 (Sep. 17, 2009) (testifying that “[y]ou’re looking at 120 megahertz ... of spectrum to really deliver true broadband services” and “you also need to have contiguous blocks of spectrum to really be able to deliver the true ... broadband experience”), http://www.broadband.gov/docs/ws_25_spectrum.pdf.

¹⁹⁶ *Fifteenth Report*, 26 FCC Rcd at 9836 ¶ 296.

commenters fail “to recognize that the production of wireless service requires a mix of inputs.”¹⁹⁷

Auction prices, similarly, should not be the basis for weighing spectrum in the context of the screen. Auction prices reflect the value of spectrum at a particular point in time and will vary as the market varies. Moreover, prices paid at auction are driven by a number of other factors at a given time, often unrelated to spectrum’s technical characteristics.¹⁹⁸ As Verizon Wireless has previously demonstrated, if auction prices are considered in the context of all major mobile wireless spectrums auctions since 1995 and prices are adjusted for inflation, no price trends between spectrum above and below 1 GHz are discernible.¹⁹⁹ For example, there are numerous reasons why AWS spectrum sold for less in Auction 66 than 700 MHz spectrum in Auction 73, including: supply (the AWS auction had significantly more spectrum, which likely would decrease demand and thus yield lower prices per MHz-POP); encumbrances (AWS required significant band clearing of federal government use); and economic and market conditions (exploding growth in data and broadband use between the 2006 AWS auction and the 2008 700 MHz auction, which substantially increased spectrum demand by 2008). Dr. Katz concludes, “economic analysis clearly indicate that prices or book values are an extremely poor indexes of competitive implications.”²⁰⁰

¹⁹⁷ Katz Declaration at ¶ 69.

¹⁹⁸ *See, e.g.,* Free Press at 14-15 (“Spectrum valuations can vary within a specific spectrum band, and even within a spectrum block, as local markets have varying population density and customer demographics. Further, a specific carrier may place a higher valuation on any given block due to their own existing spectrum position, or their perceptions of their future position relative to competitors. And prices paid for specific blocks at auction may be heavily influenced by the geographic size of the block itself and the inflation (or deflation) caused by the presence of (or lack of) non-national carriers bidding for these specific blocks.”).

¹⁹⁹ *See* Verizon Wireless 2011 Competition Comments at 133-35.

²⁰⁰ Katz Declaration at ¶ 68.

While Sprint Nextel suggests reliance on book values, it acknowledges “the inherent limitations associated with spectrum book values, which reflect only each carrier’s self-assessment of the value of its spectrum holdings in a given period of time. Fluctuations in spectrum book values arising from marketplace events and technological developments also may reduce the continuing utility of specific valuations.”²⁰¹ The Commission cannot establish a screening mechanism that relies upon subjective and variable decisions of individual carriers: Any such approach would invite gamesmanship and abuse by parties trying to manipulate the Commission’s review. In light of the foregoing, consideration of any value-weighted spectrum screen or other radical adjustment to the screen is not appropriate for consideration at all, much less in the context of these proceedings.

A Spectrum Test Focused on a 4G LTE Submarket Is Ill-Conceived. Nor is there any basis for the Commission to assess Verizon Wireless’ post-transaction spectrum holdings on the basis of a new 4G LTE spectrum submarket consisting of spectrum in the AWS and 700 MHz bands. RCA simply ignores the 4G LTE services that are, or will soon be, provided in bands other than 700 MHz or AWS.²⁰² For example, MetroPCS is deploying 4G LTE “on our AWS and PCS spectrum,”²⁰³ and Sprint Nextel is deploying 4G LTE “in the G-Block of the 1900 MHz band, where [it] has a nationwide 5x5 MHz block of spectrum.”²⁰⁴ Indeed, Sprint Nextel plans an aggressive 4G LTE deployment, with the goal of covering 123 million POPs by the end of

²⁰¹ See Sprint Nextel at 18 n.45.

²⁰² RCA at 14-15.

²⁰³ METROPCS, ANNUAL REPORT 2010 at 43 (2010), <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9OTAxNjZ8Q2hpbGRJRD0tMXxUeXBIPtM=&t=1>.

²⁰⁴ Phil Goldstein, *Sprint to launch LTE on 1900 MHz spectrum by mid-2012*, FIERCEWIRELESS, Oct. 7, 2011, <http://www.fiercewireless.com/story/sprint-launch-lte-1900-mhz-spectrum-mid-2012/2011-10-07>.

this year and 250 million by the end of 2013.²⁰⁵ Sprint Nextel also plans to deploy 4G LTE on its 800 MHz spectrum by the first half of 2013.²⁰⁶ In addition, Clearwire plans to begin building a high capacity LTE network in early 2012 using its BRS/EBS spectrum, which already carries 4G WiMAX service covering approximately 131.9 million people as of December 31, 2011.²⁰⁷ These deployments discredit any suggestion that there is any distinct “4G LTE” spectrum market consisting only of 700 MHz and AWS spectrum.

Moreover, 4G LTE is not limited to use in the bands identified above. Standards setting bodies have established twenty-three bands within which LTE is “designed to operate.”²⁰⁸ The LTE Release 10 standard (“LTE Advanced”) adds eleven more bands, for a total of thirty-four bands within which the standard is designed to operate, including the MSS S-Band and L-Band and the WCS band.²⁰⁹ These standards demonstrate that 4G LTE will operate across a large range of bands, and is capable of expanding to an even broader range of bands. And, of course, other 4G technologies such as WiMAX also can be provided across many bands.

Finally, the United States has refrained from imposing technology requirements on any particular bands. Rather, the Commission’s long-standing policy is to “maintain[] technical and

²⁰⁵ Karl Bode, *Sprint: LTE Advanced on 1900 MHz PCS Spectrum*, DSL REPORTS, Oct. 25, 2011, <http://www.dslreports.com/shownews/Sprint-LTE-Advanced-on-1900MHz-PCS-Spectrum-116758>.

²⁰⁶ Sue Marek, *Sprint will deploy LTE-Advanced in the first half of 2013*, FIERCEWIRELESS, Oct. 25, 2011, <http://www.fiercewireless.com/story/sprint-will-deploy-lte-advanced-first-half-2013/2011-10-25>.

²⁰⁷ See Clearwire Annual Report, at 9, 14.

²⁰⁸ See 3GPP TS 36.101 version 8.16.0, at Table 5.5-1 (Dec. 2011) (“4G LTE Rel. 8 Standard”), <http://webapp.etsi.org/key/queryform.asp>.

²⁰⁹ See 3GPP TS 36.101 version 10.5.0 at Table 5.5-1 (Jan. 2012) (“4G LTE Rel. 10 Standard”), <http://webapp.etsi.org/key/queryform.asp>.

service neutrality in its rules and allow[] flexible spectrum use by licensees.”²¹⁰ A decision to limit a 4G LTE spectrum market assessment to certain bands would ignore this core flexibility at the heart of U.S. spectrum policy and undermine the dynamic nature of mobile broadband services.²¹¹

E. Claims Suggesting that Alternative Buyers Would Better Serve the Public Interest Must Be Rejected.

Underlying many of the claims about “aggregation” is the implication that the Commission should await a different buyer, or find another use of the spectrum, rather than review and approve these transactions.²¹² These claims ignore Section 310(d)’s direction that the Commission’s review is confined to the transaction before it rather than the relative merit of any hypothetical alternative transactions or use of the spectrum.²¹³ The Commission has acknowledged that “Section 310(d) of the Act limits our consideration to the buyer proposed in an assignment application, and we cannot consider whether some other proposal might

²¹⁰ 2010 WCS Order, 25 FCC Rcd at 11723 ¶ 28.

²¹¹ Cf. International Telecommunications Union, ICT Regulation Toolkit 4.3.2 Spectrum (last updated Feb. 2, 2012), <http://www.ictregulationtoolkit.org/en/section.2094.html> (noting that “regulators are starting to grant the right to use spectrum without regard to the type of technology” and that the “United States ... generally takes a technology-neutral approach”); see also 47 U.S.C. § 303 (providing the FCC with authority to allocate spectrum “so as to provide flexibility of use”).

²¹² See, e.g., NTCH at 5; New Jersey Division of Rate Counsel at 20-21; T-Mobile at 4-5, 16, 35; see also Free Press at 27. T-Mobile – which has its own billion dollar spectrum acquisition pending before the Commission – self-servingly implies it might have been interested if not for its ill-fated merger. See T-Mobile at 15. Yet, the Commission’s role is not to save T-Mobile from its business decisions by engineering transactions more to T-Mobile’s liking.

²¹³ 47 U.S.C. § 310(d). The House Report issued in connection with the amendments that added the current version of Section 310(d) stated that the amendments were intended to ensure that the Commission undertook its review “as though no other person were interested in securing [the] permit or license.” H.R. Rep. No. 82-1750 at 12 (1952), *reprinted at* 1952 U.S.C.C.A.N. 2234, 2246.

comparatively better serve the public interest.”²¹⁴ The “fundamental purpose” of this provision is to “avoid ‘an unwise invasion by a governmental agency into private business practice ... and undue delay in passing upon transfers of licenses.’”²¹⁵

F. The Remaining Issues Raised by Commenters Are Not Specific to the License Assignments Under Review and Should Be Rejected.

Commenters set forth a laundry list of additional matters that they urge the Commission to consider in this proceeding. None of these issues is specific to the transactions under review, and many have either been addressed or are currently under consideration in ongoing, industry-wide dockets. The Commission does not address or weigh alleged harms in the context of a transaction unless they are “transaction-specific” – *i.e.*, unless they directly “arise from the transaction.”²¹⁶ The Commission “will not impose conditions to remedy pre-existing harms or harms that are unrelated to the transaction”²¹⁷ or “single Applicants out for special treatment unwarranted by any likely adverse consequences of the transaction.”²¹⁸ Further, it does “not consider arguments in [merger] proceeding[s] that are better addressed in other Commission

²¹⁴ See, e.g., *Citadel Communications Co., Ltd. and Act III Broad. of Buffalo, Inc.*, Memorandum Opinion and Order, 5 FCC Rcd 3842, 3844 ¶ 16 (1990).

²¹⁵ See *MMM Holdings, Inc. and LIN Broadcasting Corp.*, Memorandum Opinion and Order, 4 FCC Rcd 6838, 6839 ¶ 8 (CCB/MMB 1989), *aff’d*, 4 FCC Rcd 8243, 8244 ¶¶ 8-9 (1989) (quoting S. Rep. No. 44, 82d Cong., 1st Sess. 8, 8 (1951)); *Pinelands, Inc. and BHC Communications, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 6058, 6062 ¶ 14 (1992).

²¹⁶ See, e.g., *Verizon Communications Inc. and MCI, Inc.*, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18446 ¶ 19 (2005) (“*Verizon-MCI Order*”); *IT&E Overseas, Inc. and PTI Pacifica Inc.*, Memorandum Opinion and Order and Declaratory Ruling, 24 FCC Rcd 5466, 5474 ¶ 14 (2009); *Time Warner Inc. and Time Warner Cable Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 879, 887 ¶ 13 (MB/WCB/IB 2009) (“*Time Warner Order*”); *SBC Communications Inc. and AT&T Corp.*, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18303 ¶ 20 (2005) (“*SBC-AT&T Order*”).

²¹⁷ See, e.g., *AT&T-Qualcomm Order* at ¶ 79; *AT&T-Centennial Order*, 24 FCC Rcd at 13929 ¶ 30; *Sprint Nextel-Clearwire Order*, 23 FCC Rcd at 17581-82 ¶ 22.

²¹⁸ *GM-Hughes Order*, 19 FCC Rcd at 534 ¶ 131; see also *Verizon-MCI Order*, 20 FCC Rcd at 18445 ¶ 19; *SBC-AT&T Order*, 20 FCC Rcd at 18302-03 ¶ 19.

proceedings,”²¹⁹ as “perceived imbalances in the industry” are “best left to broader industry-wide proceedings.”²²⁰ Accordingly, the sundry objections raised by commenters must be rejected.

Roaming. Commenters fail to demonstrate how the spectrum acquisition will impact roaming in any way.²²¹ Nor could they. Because SpectrumCo and Cox have not been operating networks or providing roaming to other carriers, Verizon Wireless’ acquisition of spectrum from these entities will not result in any diminution in the number of service providers offering roaming, and therefore will have no competitive impact on the availability of any roaming services. And, several regional carriers have publicly touted their nationwide coverage obtained through roaming agreements.²²² In any case, the Commission has addressed these issues comprehensively.²²³ To the extent commenters are dissatisfied with the negotiation process or

²¹⁹ See, e.g., *Craig O. McCaw and AT&T Co.*, Memorandum Opinion and Order, 9 FCC Rcd 5836, 5904 ¶ 123 (1994) (“*McCaw-AT&T Order*”); see also *AT&T-Centennial Order*, 24 FCC Rcd at 13969 ¶ 133 (stating that general concerns regarding roaming would be more appropriately addressed in the relevant proceeding); *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8748, ¶ 101 (same).

²²⁰ *GM-Hughes Order*, 19 FCC Rcd at 534 ¶ 131.

²²¹ See NTCH at 6-7; Public Knowledge at 48; RCA at 35, 56.

²²² See, e.g., MetroPCS Communications Inc., Form 10-Q (Third Quarter 2011 Earnings Report) at 23 (filed Nov. 1, 2011) (discussing service plans “offering nationwide voice, text messaging and web browsing services on an unlimited basis beginning at \$40 per month”), <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NDUwMTgyfENoaWxkSUQ9NDc0ODc0fFR5cGU9MQ==&t=1>; Leap Wireless International, Inc., Form 10-Q (Third Quarter 2011 Earnings Report) at 4 (filed Nov. 3, 2011) (touting “unlimited nationwide wireless services”), <http://services.corporate-ir.net/SEC/Document.Service?id=P3VybDIodHRwOi8vaXluaW50Lndlc3RsYXdidXNpbmVzcy5jb20vZG9jdW1lbnQvdjEvMDAwMTA2NTA0OS0xMS0wMDAwMDkvZG9jL0x1YXBXaXJlbGVzc0ludGVybmF0aW9uYWxfMTBRXzlwMTExMTA0LnBkZiZ0eXBIPtImZm49TG9VhcFdpdmVsZXNzSW50ZXJuYXRpb25hbF8xMFFfMjAxMTExMDMucGRm>.

²²³ See *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, Second Report and Order, 26 FCC Rcd 5411 (2011) (“*Data Roaming Order*”), recon. pending, appeal pending.

the terms and conditions for roaming, they may file a complaint with the Commission.²²⁴ There is no basis for imposing conditions here to address an alleged “harm” that is not specific to the instant transactions.

Interoperability. There is no basis to impose conditions relating to device interoperability in the Lower 700 MHz spectrum band.²²⁵ When commenters sought similar conditions as part of the AT&T-Qualcomm spectrum transaction, the Commission declined:

We do not believe ... that it is appropriate to address as part of this transaction the various interoperability obligations requested by several parties as possible conditions. Even if we assume that the lack of Lower 700 MHz interoperability causes significant competitive harm, such harm already existed independent of the license transfer applications before us. We believe the better course would be to consider the numerous technical issues raised by the lack of interoperability through a rulemaking proceeding, and we plan to begin such a proceeding in the first quarter of next year.²²⁶

This holding is particularly apt for these transactions, which – unlike AT&T-Qualcomm – do not involve *any* licenses in the lower 700 MHz band.

Buildout or Use It Conditions. The spectrum at issue here is already subject to AWS substantial service requirements, and no party attempts to demonstrate that either SpectrumCo or Cox has not complied with those requirements.²²⁷ Commenters that assert these requirements are inadequate or seek to impose novel “use it or share it” concepts essentially criticize existing Commission build-out rules.²²⁸ They can seek modifications in an industry-wide rulemaking –

²²⁴ *Data Roaming Order*, 26 FCC Rcd at 5448-5453 ¶¶ 74-87.

²²⁵ See NTCH at 8-9; RCA at 57-58.

²²⁶ *AT&T-Qualcomm Order* at ¶ 71.

²²⁷ See *supra* Section I.E.3.

²²⁸ See Public Knowledge at 49-52.

but not here.²²⁹ The request by one commenter to impose buildout obligations on Verizon Wireless' Lower 700 MHz spectrum holdings – spectrum that is not even part of these transactions – should be summarily rejected.²³⁰ To the extent there is any “harm” alleged here, it is surely not specific to the license assignments, given that the AWS licenses are currently not being used to provide service to customers. If anything, the license assignments will speed the use of the spectrum at issue.

Backhaul. Commenters request conditions on Verizon Wireless related to backhaul,²³¹ but as with interoperability, access to backhaul facilities is an issue of industry-wide relevance that is the subject of a pending rulemaking proceeding, and is not related to any transaction-specific harm, as the Commission held in the *AT&T-Qualcomm Order*.²³² Moreover, commenters' arguments address the alleged consequences of the Commercial Agreements, not the proposed spectrum license assignments, and are therefore not appropriate in this Section 310(d) review. In any event, the marketplace for high-capacity services is marked by growth, competition, diverse suppliers and service offerings, and continuous innovation.²³³ To the extent commenters disagree, the proper forum for their arguments is the Commission's open rulemaking, not these transactions.

Open Internet. Open Internet issues are matters of industry-wide relevance, and there is no basis to subject Verizon Wireless to any Open Internet-related conditions.²³⁴ Such conditions

²²⁹ See *id.*; NTCH at 5.

²³⁰ See RCA at 57-58.

²³¹ See NTCH at 12-13; RCA at 58.

²³² *AT&T-Qualcomm Order* at ¶¶ 77-79.

²³³ See, e.g., Verizon Wireless 2011 Competition Comments at 99-107 (and sources cited therein).

²³⁴ New Jersey Division of Rate Counsel at 37, 39.

would bear no relationship whatsoever to the license assignment under review, as the Commission held in the *AT&T-Qualcomm Order*.²³⁵ Moreover, to the extent parties disagreed with the Commission’s rulemaking findings, the proper course of action was to seek reconsideration or judicial review.

Handset Exclusivity. In the *AT&T-Qualcomm Order*, the Commission included handset exclusivity among the set of issues not appropriately addressed in a spectrum acquisition proceeding.²³⁶ Moreover, handset exclusivity claims are the subject of a separate request for rulemaking,²³⁷ and parties fail to provide any basis for concluding that these transactions impact handset exclusivity. In fact, commenters offer no new information, facts, or data that have not already been raised in that rulemaking proceeding.²³⁸

Resale. As described below, Section 310(d) authorizes the Commission to evaluate harms allegedly arising from the spectrum license assignments at issue – not harms alleged to arise from the Commercial Agreements.²³⁹ In any case, the industry is replete with joint marketing agreements and other joint ventures, which afford reciprocal benefits to the participants and create benefits for consumers. Requests for government-supervised resale and associated claims of harm arising from the Commercial Agreements are therefore both irrelevant and not appropriately addressed here.

²³⁵ See *AT&T-Qualcomm Order* at ¶¶ 77-79.

²³⁶ See *AT&T-Qualcomm Order* at ¶¶ 75, 79.

²³⁷ See Rural Cellular Association, Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers, RM-11497 (filed May 20, 2008).

²³⁸ See NTCH at 9-10; Public Knowledge at 53.

²³⁹ See Comments of Communications Workers of America and the International Brotherhood of Electrical Workers (“CWA”) at 25; RCA at 56-57; NTCH at 11-12.

Billing Practices. The Commission should deny a petition which seeks to challenge Verizon Wireless’ basic qualifications due to a matter relating to Verizon Wireless’s billing practices.²⁴⁰ The Enforcement Bureau thoroughly investigated this same matter and, in adopting a Consent Decree, “conclude[d] ... [that it] raises no substantial or material questions of fact as to whether Verizon Wireless possesses the basic qualifications, including those related to character, to hold or obtain any Commission license or authorization.”²⁴¹ That conclusion became final more than a year ago,²⁴² and there is no basis to revisit it here.

Discounted Broadband Services. The Commission should reject a request to require Verizon – not Verizon Wireless – to implement a program under which income-eligible families may obtain discounted broadband services and computers.²⁴³ This request on its face is irrelevant to the proposed spectrum transfer as it does not even relate to Verizon Wireless, much less the spectrum the parties are proposing to transfer. Regardless, both Verizon and Verizon Wireless already offer all consumers a wide range of affordable services and devices, including multiple 4G and 3G smartphones, basic phones, USB modems, and mobile hotspots.

²⁴⁰ Petition to Deny of Diogenes Telecommunications Project (“DTP”) at 27-28.

²⁴¹ *Verizon Wireless, Data Usage Charges*, Order, 25 FCC Rcd 15105 ¶ 4 (EB 2010); *see also Verizon Wireless, Data Usage Charges*, Consent Decree, 25 FCC Rcd 15107 (EB 2010).

²⁴² *See* 47 C.F.R. §§ 1.106(f), 1.115(d), 1.117(a).

²⁴³ New Jersey Division of Rate Counsel at 38-39.

III. THE COMMISSION DOES NOT REVIEW AGREEMENTS THAT DO NOT INCLUDE LICENSE TRANSFERS, AND IN ANY EVENT THE COMMERCIAL AGREEMENTS ARE BEING REVIEWED BY THE DEPARTMENT OF JUSTICE.

Commenters argue that the Commission must review and approve the separate Commercial Agreements that Verizon Wireless has entered into with the owners of SpectrumCo and Cox, respectively.²⁴⁴ The Commission should reject these arguments.

Consideration of the Commercial Agreements is not necessary for – or even relevant to – the review of the spectrum license assignments here. The license assignments and Commercial Agreements are separate from, and not contingent on, each other. The Commercial Agreements do not effectuate license assignments or a change in ownership or control of a licensee or common carrier Section 214 authorization, and only such actions require advance Commission review and approval.²⁴⁵

That these agreements are not subject to Commission review in this Section 310(d) proceeding is evident from their purpose and scope:

- First, the parties entered into a series of agreements where they will act as agents selling one another's services ("Agent Agreements"). But because sales agreements of this type do not involve a change in license ownership or control, the FCC has never reviewed them. Indeed, Verizon Wireless alone has numerous agreements under which other entities act as its agent selling its services, as do other providers throughout the industry. The Commission did not subject these agreements to review and approval, nor could it have done so under the Act.
- Second, the parties entered into agreements in which the cable companies have the option, after approximately four years, to become resellers of Verizon Wireless' services ("Reseller Agreements"). But these agreements, which only establish a future option, likewise do not involve any change in ownership or control. Again,

²⁴⁴ See, e.g., CWA at 5; Comments of DIRECTV, LLC ("DIRECTV") at 2, 5; Free Press at 40; Comments of Greenlining Institute ("Greenlining Institute") at 1-5; Petition to Deny of Hawaiian Telecom Communications, Inc. Petition to Deny ("Hawaiian Telecom") at 9-10; New Jersey Division of Rate Counsel at 23; NTCH at 10, 12; Public Knowledge at 17-21; RCA at 37-40; RTG at 4; Sprint Nextel at 2; T-Mobile at 7, 18-20.

²⁴⁵ 47 U.S.C. §§ 214, 310(d).